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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-962

TENNESSEE GAS PIPELINE COMPANY,
a Division of Tenneco Inc.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

RESPONSE OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee), hereby responds to the brief filed by the Respondent Federal Energy Regulatory Commission (Commission) in opposition to Tennessee's petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit:

1. As the Commission acknowledges, the decision below of the District of Columbia Circuit is "in direct conflict" with the decision of the Fifth Circuit in *United Gas Pipeline Company* v. *F.E.R.C.*, 597 F.2d 581 (1979), which is the subject of the Commission's conditional petition for a writ of certiorari in No.

79-1055.[1] The decision below is also in direct conflict with the December 17, 1979 decision of the Fifth Circuit in *Trunkline Gas Company* v. *F.E.R.C.*, 608 F.2d 582 (1979).[2] Additionally, the rationale of the District of Columbia Circuit's holding concerning the imposition of a retroactive rulemaking requirement conflicts with the Seventh Circuit's earlier decision in *Natural Gas Pipeline Company of America* v. *F.E.R.C.*, 590 F.2d 664 (1979), albeit the Seventh Circuit decision only with Order No. 499 advance payment agreements.[3]

Although the Commission acknowledges the "conflict between the court below and the Fifth Circuit," it asserts that the conflict does not merit resolution by this Court—advancing two basic reasons which are shown below to be without merit.

To begin with, the Commission contends that the "question" is not ripe for review, because (Commission Brief, pp. 3-4):

> The question of the eligibility of the advance payments petitioner made under Order 465 has been remanded to the Commission, with directions that the Commission must consider its own responsibility for the ambiguity in the Order and its effect

[1] Commission Brief, p. 3; Commission Petition in No. 79-1055, p. 12.

[2] A copy of the *Trunkline* decision was filed by Tennessee on January 4, 1980 as a supplement to its petition in No. 79-962.

[3] Far from being "slightly different" as stated by the Commission (p. 5, fn. 4), the language cited by the Fifth and Seventh Circuits in differentiating the Order No. 499 advances goes to the heart of the question since it was in Order No. 499 that the Commission for the first time required a timing relationship between advances made by a pipeline and the expenditures by the producer.

> on the industry (Pet. App. 54a-55a n. 97), as well as the pipeline's arguments that the payments in fact benefited the consumers (Pet. App. 51a-56a, 63a-72a). Accordingly, petitioner's contentions concerning the economic advantages of the advance payments to consumers (Pet. 8-9, 22-23) and its reliance on prior Commission interpretations (Pet. 14-20) should be presented to the Commission in the reconvened proceeding in the first instance. (footnote omitted)

This argument, however, begs the question that is in conflict. In reversing the Commission's decision in the *United* case as to Order No. 465 advances, the Fifth Circuit held that no timing requirement had in fact been imposed by Order No. 465 and hence the Commission's belated attempt to impose such a requirement with respect to Order No. 465 advances was an "after the fact, in fact retroactive, imposition of standards" which "the law will not tolerate" (597 F.2d at 586). Thus, under the Fifth Circuit's reasoning, the Commission's decision in the instant proceeding must be *reversed, not* remanded, and Tennessee and many other pipelines should be permitted to recover their costs on hundreds of millions of dollars of advance payments made to producers under Order No. 465 in a good faith effort to obtain gas supplies for their systems. Far from shedding further light on the crucial question of the existence *vel non* of a timing requirement, the remand directive of the District of Columbia Circuit will only result in continued denial of the pipelines' recovery of their costs for several years pending further litigation in this matter which has already taken six years to reach this point.

Moreover, the Commission's suggestion that "Petitioner's contentions concerning the economic advan-

tages of the advance payments to consumers . . . and its reliance on prior Commission interpretations . . . should be presented to the Commission in the reconvened proceeding in the first instance" overlooks the fact that such evidence was presented in the hearings before the Commission and, therefore, the Commission had its opportunity to consider such evidence in "the first instance."

As to the Commission's argument that the conflict is not of sufficient importance to warrant review (Br., p. 3), the fact is that, while the advance payment program has now been terminated by the Commission as to *new* agreements, the program has far reaching effects extending well into the future. As the Court below emphasized, the program has continuing importance because "continued administration is required [of existing agreements] as pipelines file with FERC for jurisdictional rate increases" (Pet. App., p. 12a). Indeed, as further noted in the District of Columbia Circuit's decision, almost 99 percent of the total of $5.5 billion committed by interstate pipelines under the advance payments program was of the front-end type here in controversy (Pet. App., p. 21a, n. 38).[4] Resolution of the conflict is, therefore, of critical

[4] The Commission's effort (pp. 5-6) to minimize the dollar impact is without merit. For example, the revenue loss to Tennessee of $21 million referred to in footnote 6 of the Commission's brief (which is not in the record or explained by the Commission) fails to indicate that this would be an annual loss until permitted to be recovered in rates by Tennessee. Moreover, the Commission's $21 million figure fails to take into account the annual loss for all other pipelines in the same position as Tennessee. Finally, the losses are not just past losses, but are continuing losses of an enormous magnitude until such time as the advances are allowed in rate base, or are repaid by the producers. Under the Commission's regulations, a producer can take as long as ten years to completely repay and advance payment.

and continuing importance to the natural gas pipeline industry and the public served by it.

Finally, review by this Court is required in order to put to rest the uncertainty generated by the conflicting decisions among the Courts of Appeals. Ironically, the Commission urges the Court to grant its conditional petition in No. 79-1055 if the Court grants the instant petition "so that the interpretation of Order 465 will be uniform for pipelines and consumers throughout the country" (Commission Petition in No. 79-1055, p. 10). Since there will be no uniformity in interpretation if the conflict is not resolved, the granting of the petition in the instant case is necessary to resolve the conflict, only then will "the interpretation of Order No. 465 . . . be uniform for pipelines and consumers throughout the country."

Respectfully submitted,

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